

FILED
IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
2007 APR -5 AM 10:47

PAUL E. FORSHEY and
MELISSA L. FORSHEY,

Plaintiffs,

v.

THEODORE A. JACKSON, M.D.,

Defendant.

CAITLYN S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT
CASE NO. 06-C-1534

Judge Jennifer Bailey Walker

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT ORDER**

During the proceedings held in regard to this matter on November 17, 2006, Defendant's Motion to Dismiss was presented before this Honorable Court.

Having considered the evidence and arguments submitted by the parties, the Court hereby makes and enters the following findings of fact, conclusions of law and Judgment Order:

FINDINGS OF FACT

1. The Plaintiff underwent a surgical procedure to his left hand on July 6, 1995. The Defendant, Theodore A. Jackson, M.D. performed said surgical procedure.
2. The Plaintiff alleges that in 1996 or 1997, he complained of a painful swelling and a knot over the palmar aspect of the left thumb.
3. On January 8, 1997, the Plaintiff presented for an office visit at Dr. Jackson's request for said complaints, and an exploratory surgical procedure was scheduled for February 3, 1997.

Case 20

4. On January 31, 1997, Dr. Jackson's office contacted the Plaintiff in order to re-schedule said surgery due to a scheduling conflict. The surgery was then scheduled for February 17, 1997.
5. On February 13, 1997, the Plaintiff called to cancel the surgery and indicated that he would call back to re-schedule the same. However, the Plaintiff never did so.
6. The Plaintiff alleges that he learned in July, 2005, following an x-ray of his left hand, that a foreign body was in Plaintiff's left hand.
7. Dr. Edward W. Eskew, Plaintiff's expert, has authored a Certificate of Merit, wherein he opined that the foreign body was left in the palmar aspect of the Plaintiff's left thumb during the course of the surgical procedure performed in 1995.
8. It was not until on or about August 3, 2006, the Plaintiff filed the present action pursuant to the provisions of the W.Va. Medical Professional Liability Act §55-7b-1, et seq.

CONCLUSIONS OF LAW

Having made the foregoing findings of fact, the Court now makes the following conclusions of law:

9. Pursuant to the provisions of West Virginia Medical Professional Liability Act, §55-7b-4, Plaintiff's action must have been filed (1) within two years of the date of injury, or (2) within two years of the date when such person

discovers, or with the exercise of reasonable diligence, should have discovered the injury, whichever occurs last.

10. The Medical Professional Liability Act, in clear and concise language, includes a statute that places an outside limit of 10 years on the filing of medical malpractice claims, regardless of the date of discovery, unless there is evidence of fraud, concealment or misrepresentation of material facts by the health care provider. (*Gaither v. City Hosp.*, 199 W.Va. 706, 487 S.E.2d 901 (1997)). Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations.
11. In the instant case, the Plaintiff has failed to demonstrate that the Defendant misrepresented material facts or otherwise acted to prevent the Plaintiff from discovering the nature of his injuries. By Plaintiff's own admission in their Notice of Claim, Plaintiff acknowledged that he complained of painful swelling and a knot over the palmar aspect of his left thumb in 1996 and 1997. Furthermore, Dr. Jackson scheduled an exploratory surgery for February 3, 1997, and the same was later re-scheduled for February 17, 1997, due to a scheduling conflict. The Plaintiff subsequently cancelled this surgery. Therefore, the Plaintiff cannot claim that the Defendant acted in a manner to prevent the Plaintiff from discovering the nature of his injuries. It was at this time, in 1996 or 1997 when the Plaintiff acknowledged that he complained of painful swelling and a knot over the palmar aspect of his thumb, that he, with the

exercise of reasonable diligence, should have discovered the injury, and the Plaintiff's Complaint should have been filed within two years of this date due to the application of the discovery rule. However, viewing in a light most favorable to the Plaintiff, pursuant to West Virginia's statute of repose discussed above, the absolute latest that this action could have been filed would have been on July 6, 2005, which is ten years after the date of the original surgery and alleged injury.

12. The West Virginia Medical Professional Liability Act §55-7B-4(b) provides "That in no event shall any such action be commenced more than ten years after the date of injury." (Emphasis added)
13. The laws of the State of West Virginia are controlling in this matter.

ORDER

WHEREFORE, it is hereby ADJUDGED, ORDERED and DECREED that the Defendant's Motion to Dismiss is GRANTED. This action shall be dismissed without prejudice and stricken from the Court's docket, with costs assessed to the Plaintiff.

The Clerk is directed to send a true copy of the foregoing Findings of Fact, Conclusions of Law, and Order to the parties.

ENTERED THIS 3rd day of April, 2007.



THE HONORABLE JENNIFER BAILEY WALKER

RECORDED

04/09/07

Shourang